

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BAILEY ROTH,

Plaintiff(s),

v.

BASF CORPORATION and ZYGROVE  
CORPORATION,

Defendant(s).

NO. C07-106MJP

ORDER ON SUMMARY JUDGMENT  
MOTIONS: PRODUCT LIABILITY

The above-entitled Court, having received and reviewed:

1. Defendants' Motion for Summary Judgment (Dkt. No. 102)
2. Plaintiff's Revised Response to Defendants' Motion for Summary Judgment (Dkt. No. 159)
3. Defendants' Revised Reply Brief (Dkt. No. 161)
4. Plaintiff's Motion for Partial Summary Judgment Holding Defendants Liable Under Product Liability Act (Dkt. No. 110)
5. Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment (Dkt. No. 137)
6. Plaintiff's Reply on His Motion for Partial Summary Judgment (Dkt. No. 150)

and all exhibits and declarations attached thereto, makes the following ruling:

IT IS ORDERED that the motions of both sides regarding a finding of liability under the Washington Product Liability Act based on failure to warn are DENIED.

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment of liability under the Washington Product Liability Act based on defective design is DENIED.

1 IT IS FURTHER ORDERED that Defendants' motion for dismissal of Plaintiff's claim under  
2 the Washington Product Liability Act based on defective design is GRANTED.

### 3 **Background**

4 This litigation concerns injuries arising out of a house fire in 2005. The home in question was  
5 purchased by Ray Larsen (a former defendant) in 1980. The initial tenants were a man and his  
6 architect father, who installed (1) a wood-burning stove and (2) a wall covering behind the stove  
7 which was allegedly Z-Brick, a faux brick material which was bonded directly to the particle board on  
8 the wall.

9 On December 2, 2005, the current tenants (Plaintiff Roth and his housemate Hammond)  
10 awakened to discover that the house was on fire. Hammond escaped with minor injuries; Plaintiff  
11 suffered "significant burn injuries" (Def. Mtn., p. 2), including the loss of a hand, disfiguring scarring,  
12 and eye and lung damage. Hammond had disabled all the smoke detectors because the use of the  
13 stove would set them off (Roth knew the detectors were disabled). Other contributing factors to the  
14 fire included:

- 15 1. The wood-burning stove was installed too close to the wall, in disregard of the  
16 manufacturer's installation instructions.
- 17 2. A heat shield on the stove was improperly positioned, directing heat onto the wall  
18 behind the stove.
- 19 3. The wall covering (for purposes of this motion it is assumed to be Z-Brick) was fire  
20 resistant but not insulated; i.e., while it did not ignite itself (and in fact did not even  
21 show discoloring from the heat), it transmitted heat to the particle board and wooden  
22 spacers. Eventually that heat was sufficient to ignite the interior wall materials.
- 23 4. The walls had been "capped" at the top in violation of the building code, so that the  
24 heat could not vent out of the wall interior, but instead built up to ignition-level.

## Discussion

The Washington Product Liability Act (“WPLA”) holds a product manufacturer liable to an injured plaintiff if the plaintiff’s “harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.” RCW 7.72.030(1).

### Design defect

Plaintiff cites to Washington case law concerning the two tests used to determine “defective design:”<sup>1</sup>

1. Risk-utility test: weighs the likelihood and seriousness of harm against the burden on the manufacturer to design a non-harmful product which still functions in the manner for which the product was intended.
2. Consumer-expectation test: asks if the product is “unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” RCW 7.72.030(3).

Higgins, 123 Wn.App. at 827-30.

Plaintiff’s argument that Z-Brick qualifies as a defective product under the “risk-utility” test is comprised entirely of unsupported conclusory statements that Z-Brick “could have designed a product . . . that was in fact firesafe” and that “the cost and feasibility of minimizing the risk are minuscule.” Pltf. Mtn., p. 12. Plaintiff offers no expert testimony on this issue – all his citations to expert testimony concern the necessity of (and lack of) adequate warnings concerning the use of the product. On this basis, he has failed to establish undisputed material facts sufficient to support a grant of summary judgment on the design defect issue.

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<sup>1</sup> Plaintiff tries to argue that these two tests apply to “design defect” and “failure to warn,” but the case which he cites for the elements of the tests – Higgins v. Intext Recreation Corp., 123 Wn.App. 821, 827-30 (2004) – does not say the tests apply to failure to warn. A close reading of the opinion makes it clear that the Higgins court is applying the tests to defective designs only.

1       Regarding Defendants' motion that the product liability claims of this plaintiff regarding the  
2 defective design of Z-Brick should be dismissed, the Court is in agreement. Even assuming that all the  
3 facts as presented by Plaintiff are not in dispute, and making every inference on every factual issue in  
4 Plaintiff's favor, Defendant is still entitled to judgment as a matter of law on this issue. The WPLA  
5 assesses liability where a product is "not reasonably safe as designed" (emphasis supplied), and  
6 Plaintiff has failed to produce any evidence that the design of the Z-Brick product was unsafe. There  
7 is no evidence that Z-Brick was designed to be an insulating material or protect other combustible  
8 materials from catching fire. Plaintiff has produced no evidence (either in his own motion or in  
9 response to Defendants' motion) that the faux brick material does not do what it was intended to do or  
10 was unreasonably unsafe because of the way it was designed.

11       The crux of Plaintiff's case is that the product was negligently promoted or marketed as  
12 "firesafe," "fire resistant" and "fire proof," and advertised for use with fire-producing devices (which  
13 was only one of its possible uses – the product had purely decorative functions as well) without  
14 adequate warnings of its lack of insulating properties.<sup>2</sup> There is nothing inherently defective or  
15 unreasonably unsafe about a product which is meant to withstand high temperatures without  
16 discoloring or burning up itself while not insulating other materials from doing the same, and Z-Brick  
17 does not violate the WPLA in that regard. Plaintiff's theory of liability must rise or fall on whether the  
18 manufacturers of Z-Brick failed to warn the reasonable consumer that, in using the material in  
19 conjunction with fire-producing devices (fireplaces, wood burning stoves, etc.), it would not act as an  
20 insulating agent for other flammable elements. This is not the harm that the "defective design"

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23       <sup>2</sup> As Plaintiff himself states, he "will prove at trial that his injuries were caused by the Z-Brick facing's failure  
24 to be 'firesafe' *as marketed and installed*, and by its *lack of appropriate warnings and instructions*." Pltf. Mtn. for  
25 Partial S/J on Product Liability, p. 2. (emphasis supplied.). In framing his issues for this summary judgment motion,  
Plaintiff speaks only of Z-Brick being "deceptively sold as 'firesafe,'" "sold without warnings about the risk of fire" and  
"sold without instructions on how to install in proximity to a wood-burning fireplace." *Id.* at p. 6.

1 portion of the WPLA was intended to remedy, and Defendants are entitled to summary judgment of  
2 dismissal of this portion of Plaintiff's claim.

3 Failure to warn

4 Neither side succeeds in meeting their summary judgment burden of proof of this element of  
5 WPLA liability.

6 Plaintiff's argument that he should be granted summary judgment of liability on his "failure to  
7 warn" claim fails on a number of grounds. First, because he has been unable to produce the person  
8 who actually installed the wall covering and the stove, he has no evidence regarding what effect an  
9 adequate warning would have had on the installation of the Z-Brick in this house. Although the Court  
10 does not believe that the state of the law is such that Plaintiff is required to produce the person who  
11 actually used the product, it might possibly have provided some evidence in support of his motion had  
12 he been able to do so.

13 Second, Plaintiff has been unable to produce any packaging, brochures or owner's pamphlets  
14 for Z-Brick from the period in which the wall covering at issue was installed (1980). He has submitted  
15 packaging and instructional items from an earlier time (1975) and also more recently, but nothing from  
16 the date of installation (which the owner of the house estimates at October or November 1980). The  
17 lack of direct evidence regarding the warnings or absence on warnings on the packaging of the  
18 material actually used in the Larsen house highlights the speculative nature of Plaintiff's claim and the  
19 absence of the undisputed material facts necessary to his success on this portion of his motion.

20 Finally, the evidence Plaintiff has produced consists of the materials from periods of time prior  
21 to and after the date of the actual installation. Even considered as "undisputed evidence of material  
22 facts" (i.e., there can be no dispute about the writing on the packaging and pamphlets), this does not  
23 entitle Plaintiff to summary judgment as a matter of law on his failure to warn claim. Both the  
24 handbooks from before and after the date that the wall covering and stove were installed contain  
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1 warnings that “[u]nits must be installed in compliance with code and specified clearance directions  
2 with the fireplace unit” (Supp. Perey Decl., Ex. E) and “[b]e sure to conform to local building and fire  
3 codes and the clearances specified by the fireplace manufacturer for both walls and hearths.” (*Id.*, Ex.  
4 K.) There certainly can be disagreement about whether these cautionary messages are adequate to  
5 warn of the hazards of which Plaintiff complains, but to call them inadequate as a matter of law would  
6 be overreaching.

7 By the same token, considering Defendants’ motion for summary judgment of dismissal of this  
8 claim, the evidence viewed in the light most favorable to Plaintiff mitigates against a grant in favor of  
9 the moving party. The Court does not accept Defendants’ argument (offered without statutory or case  
10 law support) that Plaintiff is required to prove that a specific installer of Z-Brick (e.g., Larsen’s first  
11 tenant) viewed the packaging or instructions or what that specific installer of the product might or  
12 might not have done in response to any warnings which the packaging or instructions contained. The  
13 standard is whether a reasonable consumer, upon viewing whatever warnings or instructions were  
14 provided, would have been adequately cautioned about the potential dangers of using the product.

15 See Lockwood v. AC & S, Inc., 44 Wn.App. 330, 348. (“The relevant question is. . . whether  
16 a warning could have been given that would render the produce safe or at least less dangerous to the  
17 ordinary consumer; and whether a warning was given. The focus is on the product and the  
18 expectations of a reasonable consumer.”)

19 The Court is not persuaded by Defendants’ argument that analyzing the possible effects of a  
20 warning on a reasonable consumer constitutes impermissible “speculation.” The case Defendants cite  
21 in support of this argument – Hiner v. Bridgestone/Firestone, Inc., 138 Wn.2d 248, 256 (1999) – is  
22 distinguishable: in that case there was a complete absence of warning and the Court was being asked  
23 to speculate on what effect the warnings would have had if they had been included with the product.  
24 That is not the case here. The evidence produced has revealed cautionary language concerning the use

1 of this product. The issue is whether that is sufficient to apprise a reasonable consumer of the possible  
2 dangers associated with the installation of Z-Brick.

3 As mentioned, Plaintiff has produced some evidence of what the packaging and  
4 installation/ownership literature of the Z-Brick product said about the use of the wall covering. A Z-  
5 Brick Products Handbook produced by the manufacturer of the product indicates that “[a] primary  
6 ingredient in Z-BRICK is vermiculite – a material also used in insulation...” Supp. Perey Decl., Ex. A.  
7 The Court is not prepared to rule as a matter of law that language such as that would not create, in the  
8 mind of a reasonable consumer of this product, the impression that it had some insulating properties.  
9 Defendant is not entitled to summary judgment of dismissal on Plaintiff’s “failure to warn” claim.

10 The Court cannot leave this discussion of Plaintiff’s ultimate burden of proof in this matter  
11 without mention of the proximate cause issue which arches over his entire claim. Whether Plaintiff’s  
12 proof is of a defective design or a failure to warn, he must establish that it proximately caused his  
13 injuries. Further mitigating against a grant of summary judgment in Plaintiff’s favor is a serious issue  
14 presented in the circumstances of this case: namely, whether the improper installation of the stove (and  
15 possibly the improper construction of the wall itself) constitutes an independent intervening cause  
16 sufficient to relieve Defendants of liability altogether. Defendants touch on this argument in their  
17 motion and responsive briefing, and the Court finds it sufficiently troublesome to prevent,  
18 independently of the other legal concerns raised in the preceding paragraphs, a grant of summary  
19 judgment in Plaintiff’s favor.

20 The WPLA is inapplicable unless a plaintiff’s “harm was proximately caused by the negligence  
21 of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe  
22 because adequate warnings or instructions were not provided.” RCW 7.72.030(1). A defendant’s  
23 negligence is the proximate cause of a plaintiff’s injury only if such negligence “in a direct sequence,  
24 unbroken by any new independent cause, produces the injury complained of. . . .” (WPIC 15.01.) If an  
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1 independent intervening (or superseding) act breaks the chain of causation, a prior negligent act by a  
2 defendant may no longer be declared the proximate cause of the injury. Travis v. Bohannon, 128  
3 Wn.App, 231 (2005). The standard in Washington for determining whether an intervening act is a  
4 sufficiently superseding cause to relieve a defendant of liability is whether the intervening act can  
5 reasonably be foreseen by the defendant. Micro Enhancement Int'l, Inc. v. Coopers and Lybrand,  
6 LLP, 100 Wn.App. 412 (2002); Cramer v. Dept. of Highways, 73 Wn.App. 516 (1994) (intoxication  
7 of motorcyclist was an intervening cause, superseding state's alleged negligence in maintaining  
8 highway).


9 The foreseeability of an intervening act is ordinarily a question for the finder of fact. Qualls v.  
10 Golden Arrow Farms, 47 Wn.2d 599, 603 (1955). Without actually using the phrase "independent  
11 intervening cause," Defendants raise the issue that their product was not the proximate cause of  
12 Plaintiff's injury, and that it was not foreseeable that the stove would be constructed so close to the  
13 wall (and without its shielding properly deployed), that the wall would be improperly constructed so as  
14 to prevent heat from venting, and that the occupants of the house would disconnect the smoke alarm.  
15 The Court finds these to be valid concerns, and certainly sufficient to deny Plaintiff summary  
16 judgment on his WPLA claim.

### 17 Conclusion

18 Summary judgment will be granted in Defendants' favor on the issue of the "defective design"  
19 portion of Plaintiff's WPLA claim, and that portion of the claim will be DISMISSED. The remainder  
20 of the requests for summary judgment from both sides on issues of product liability will be DENIED.

21 The clerk is directed to provide copies of this order to all counsel of record.

22 Dated: May \_19\_, 2008

23   
24 Marsha J. Pechman  
25 U.S. District Judge